APPEAL NO. 950031
FILED FEBRUARY 21, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 7, 1994, a hearing was held. He determined that appellant (claimant) did not show that he was injured on _____, in the course and scope of employment, but did give timely notice of injury; claimant did not file a claim within one year but the time for filing was tolled by the failure of the employer to report an injury; claimant had no disability because he had no compensable injury. Claimant asserts that the decision is contrary to the great weight of the evidence, citing medical evidence and a third party action in which claimant prevailed; he also argues that it was error to exclude documents from the third party action and some deposition evidence. The finding that claimant did not timely file his claim without good cause is attacked on the basis that the injury was trivial. The appeals file contains no reply from the respondent (carrier).

DECISION

We affirm.

Claimant worked for (employer) as a truck driver. He was on the job at (the mill) when on _____, he said that as he was tightening a load on his truck, a chain broke, causing him to fall and injure his right arm and shoulder. He said that this occurred in early morning and he worked the rest of the day, at the end of which he entered the office with some documents to turn in and commented to (Mr. B), president of the company, that he had hurt himself when a chain broke. He told no one else and kept working until (date), when he went to the emergency room for treatment and then called in saying he could not work. Claimant acknowledged that he had beat upon a barbecue grill with a metal pipe the day preceding the night he went to the emergency room.

Claimant said that he did not see a doctor at the time but took aspirin from time to time as his neck hurt after the _____, fall. Claimant states that the _____, fall, not any other etiology, is what has caused his neck problem that required two surgical procedures.

(Dr. S) gave a deposition for claimant's action against the mill in the district court. In that deposition, Dr. S stated that he first saw claimant on February 3, 1993, and eventually performed surgery on him in February and September 1993 at the C5-C6 level. He took a history in which claimant said he had been injured at work, but the symptoms were not severe. He complained of neck pain with radiation into his arm. Dr. S agreed that an entry that said claimant was injured eight weeks ago indicated that the word "weeks" had been changed from something else, such as years, months, or days. Dr. S

said that the date, January 30, 1993, also appeared because his employee had called the carrier and was told to put down the date claimant had the "symptoms really bad."

Dr. S agreed that it was unusual for a claimant to be injured as described when the chain broke and then "go eight weeks" or longer (it was approximately four and one-half months since the fall) without significant complaints such as those when claimant first saw him. He added that "typically" the injury would "manifest" itself within a few days. Dr. S also added that an injury can occur and then later, a relatively minor event can cause the disc to cause a problem; he stated that this sequence was "fairly" common. Dr. S said, "I find it just about impossible to discern what has actually happened by a patient's history." Dr. S could not tell from the surgical procedures themselves how long the disc had been in the condition found. Later, he stated that he could not answer what happened in claimant's case. He did find degenerative disc disease in addition to a herniated disc and said that they usually occur together. He said that degenerative disc disease is related to aging and not "to the trauma." He did say that claimant's condition was consistent with the history that was given. Dr. S also said that in reasonable medical probability he believed that the "injury [claimant] came to you for treatment for in February of '93 was related to the injury he related to you at that time."

Other physicians who claimant saw also reported the date of injury as "(date)" ((Dr. L) on five occasions in the record), as "eight months ago" (Dr. S on February 12, 1993), and as "September 1992" (Dr. R).

Mr. B testified that he could not recall claimant saying anything about an injury in September 1992, even though he signed a statement with claimant referring to a date of injury in November 1992 for which claimant had given notice. Mr. B testified that the November date had some relationship to insurance coverage.

Carrier does not appeal the determination that notice was timely or that employer's failure to provide a report tolled the one year requirement for filing a claim under Sections 409.004 and 409.008.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Dr. S's deposition as a whole could be viewed by the hearing officer as only saying that the injury treated could be consistent with a fall several months before. The hearing officer could also consider the lengthy period of work and failure to get medical care after the stated date of injury in concluding that no injury on the job had been shown. The hearing officer is to issue a decision in which he determines whether benefits are due. *See* Section 410.168. There is no provision in the 1989 Act directing the hearing officer to render his decision based on the decision rendered by any court in a third party action. While claimant testified at length that he received a judgment for $75,000.00, plus accrued interest, against the mill, his action here is against carrier; the 1989 Act does not follow the Rules of Civil Procedure; the 1989 Act does not necessarily conform to the Rules of Civil

Evidence, and the 1989 Act does not require a finding of negligence or allow certain defenses to be used against a claimant. In addition, Section 417.001 allows a claimant to seek damages both against a third party and for workers' compensation benefits. There is no provision that a decision in one is to govern the other. Texas Workers' Compensation Commission Appeal No. 91132, dated February 14, 1992, pointed out that there is also no provision in the 1989 Act for providing a credit for unemployment insurance received by a claimant under another statute. Had the claimant been unsuccessful in his court action against the mill, he still could have been found to have a compensable injury against the employer, depending on the evidence presented at the hearing.

The documents claimant complains of as not being admitted into evidence are the judgment of the court and the charge to the court. As noted, claimant spoke at length about the fact that a judgment was entered on his behalf against the mill. Even if it were error for the hearing officer to exclude the two court documents in question, the error would not provide a basis for reversal because we do not find that it probably caused an improper determination by the hearing officer. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ).

Claimant also attacks the refusal to admit depositions. The basis for not admitting was failure to exchange, which claimant readily acknowledges. Claimant counters, though, that carrier did not file a response to the benefit review officer's recommendation of compensability. The issue was stated as not resolved and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) does not require a response by a party when the issue is listed as unresolved in the benefit review conference report even when a benefit review officer thinks that it should be resolved in favor of the other party. Whether the injury occurred in the course and scope of employment was an issue for the hearing officer to consider, and each party is responsible to exchange documentary evidence it wishes to admit.

The record of this hearing should have included copies of the evidence offered but not admitted; it did not. While in this case the evidence complained of as not admitted on appeal was either clearly within the hearing officer's discretion not to admit (depositions not exchanged) or would probably not have changed the outcome (court documents--especially since the court decision was discussed at the hearing), in most cases a decision concerning remand must consider the excluded documents themselves. In addition, we would point out that the hearing officer's extensive comments and questioning of the parties, prior to the time that each represented party was allowed to present its case and question its witnesses, tended to confuse whether some evidence had been offered and rejected.

The findings of fact and conclusions of law questioned in the appeal were sufficiently supported by the evidence of record. The decision and order are sufficiently

supported by the evidence and are affirmed. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge